

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DEAN BENALLY,
Petitioner.

No. 2 CA-CR 2016-0152-PR
Filed May 31, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Coconino County
No. CR20080670
The Honorable Cathleen Brown Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

David Rozema, Coconino County Attorney
By Joshua Kolsrud, Deputy County Attorney, Flagstaff
Counsel for Respondent

Dean Benally, Florence
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Dean Benally seeks review of the trial court’s order summarily dismissing his successive and untimely petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Benally has not met his burden of demonstrating such abuse here.

¶2 In 2008, Benally pled guilty to sexual abuse in CR 2008-0670 and shoplifting in CR 2008-0514. He was sentenced to a 4.5-year prison term for shoplifting, to be followed by a 2.25-year prison term for sexual abuse. He has sought post-conviction relief on two prior occasions. In his first proceeding, he argued his counsel had been ineffective in failing to file a motion to suppress evidence or a motion to dismiss the indictment. The trial court summarily denied relief, and this court denied review of Benally’s petition for review. In his next proceeding, under both cause numbers, Benally claimed he had not been sentenced in accordance with the plea agreement. The trial court summarily dismissed the proceeding, and Benally did not seek further review of that ruling after the court denied his motion for rehearing.

¶3 In his most-recent proceeding in CR 2008-0670, Benally asserted that his trial counsel had been ineffective, his plea had been unlawfully induced, and he was entitled to presentence incarceration credit. He also claimed he had “never met the said victim, nor did he know her,” and therefore “the allegation should not stand, because there is no ‘knowingly’ or ‘intentionally’ involved in this matter.” The trial court summarily dismissed the proceeding, and this petition for review followed.

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¶4 On review, Benally again claims he is entitled to presentence incarceration credit and argues his counsel was ineffective in failing to raise that issue and because “there existed no ‘intentionally’ or ‘knowingly’ in this matter,” apparently because he was drunk at the time of the incident. Benally’s sentencing claim, as well as his claims of ineffective assistance of counsel, cannot be raised in an untimely proceeding like this one. *See* Ariz. R. Crim. P. 32.1(a), (c); 32.4(a); *see also State v. Goldin*, 239 Ariz. 12, ¶ 14, 365 P.3d 364, 368 (App. 2015) (claims of ineffective assistance “fall under Rule 32.1(a)”). And Benally is mistaken that Rule 32.2(b) “rebutts” the provision in Rule 32.4(a) that only claims made pursuant to Rule 32.1(d) through (h) may be raised in an untimely proceeding.¹ The trial court did not err in summarily dismissing this proceeding.

¶5 We grant review but deny relief.

¹In his notice below, Benally indicated he would raise claims of newly discovered evidence, that his failure to timely seek post-conviction relief was without fault on his part, and of a significant change in the law. Benally has not raised any such claims.